STATE OF NEBRASKA. }
} ss.
LANCASTER COUNTY. }

Wardner G. Scott, being first duly sworn on oath, deposes and says that he is State Engineer and Head of the Department of Roads and Irrigation of the State of Nebraska, and as such is one of the petitioners herein; that he has read the foregoing Petition for Writ of Certiorari, that he knows the contents thereof and that the statements of fact therein contained are true as he verily believes.

WARDNER G. SCOTT.

Subscribed in my presence and sworn to before me this ---------- day of April, 1942.

MAGDALENE E. GLANDT,
Notary Public.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

I.

The Decision of the Circuit Court of Appeals is in Conflict With the Applicable Nebraska Law.

The applicable Nebraska constitutional and statutory provisions read as follows:

Constitution of Nebraska, Article 15, Sections 4, 5 and 6, as follows:

> "Sec. 4. WATER A PUBLIC NECESSITY. The necessity of water for domestic use and for irrigation purposes in the State of Nebraska is hereby declared to be a natural want. (Adopted, 1920.)
>
> "Sec. 5. USE OF WATER DEDICATED TO PEOPLE. The use of the water of every natural

stream within the State of Nebraska is hereby dedicated to the people of the state for beneficial purposes, subject to the provisions of the following section. (Adopted, 1920.)

"Sec. 6. RIGHT TO DIVERT UNAPPROPRIATED WATERS. The right to divert unappropriated waters of every natural stream for beneficial use shall never be denied except when such denial is demanded by the public interest. Priority of appropriation shall give the better right as between those using the water for the same purpose, but when the waters of any natural stream are not sufficient for the use of all those desiring to use the same, those using the water for domestic purposes shall have preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes. Provided, no inferior right to the use of the waters of this state shall be acquired by a superior right without just compensation therefor to the inferior user. (Adopted, 1920.)"

Nebraska Compiled Statutes 1929, Sections 46-502, 46-503 and 46-504 as follows:

"46-502. WATER, DEDICATED TO PUBLIC USE. The water of every natural stream not heretofore appropriated within the State of Nebraska is hereby declared to be the property of the public, and is dedicated to the use of the people of the state, subject to appropriation as herein provided.

"46-503. SAME, APPROPRIATORS FIRST IN RIGHT. As between appropriators, the one first in time is first in right.

"46-504. SAME, APPROPRIATION, PRIORITY. The right to divert unappropriated waters of every natural stream for beneficial use shall never be

> denied. Priority of appropriation shall give the better right as between those using the water for the same purposes, but when the waters of any natural stream are not sufficient for the use of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming it for any other purpose, and those using the water for agricultural purposes shall have the preference over those using the same for manufacturing purposes."

It is the contention of the petitioners that, under these provisions of the Nebraska statutes and constitution, the water in question, namely, the waters flowing in the drains, must be distributed to appropriators in Nebraska in their order of priority. In effect, the decision of the Circuit Court of Appeals takes these waters away from the senior Nebraska appropriators who are in need of the waters and gives them to the lands under the Northport Irrigation District, who are junior appropriators.

While the Nebraska Supreme Court has never interpreted these statutory and constitutional provisions in their relation to return flow waters, we believe that such waters are clearly within the purview of these provisions, and that the decision of the Circuit Court of Appeals does violence to Nebraska law.

It is, of course, elementary that an appropriator of water has only a usufructuary right and that he acquires no ownership in the corpus of the water itself. His right is intangible to apply the water to beneficial use, but his right is based upon the uses which he makes of the water and never constitutes ownership of the water itself (See 30 American Jurisprudence, page 616; *Atchison* v. *Peterson*, 87 U. S. 507, 22 Law Ed. 414). The same principle underlies rights acquired under the

United States Reclamation Act, wherein it is stated "beneficial use shall be the basis, measure and limit of the right" (Act of June 17, 1902, Chapter 1093, Sec. 8, 32 Statutes 390, 43 U. S. C. A. Sec. 372).

Moreover this provision of the Reclamation Act is also coupled in the same section with the provision that water rights under that act shall be appurtenant to land.

The Nebraska law is likewise to the same effect (*Farmers Canal Company* v. *Frank*, 72 Neb. 136, 100 N. W. 286).

It seems clear that the right of the landowner under the Pathfinder Irrigation District, for whom the water was diverted, must have ceased when he has made use of it on his land. Before the water ever could be in the drain (the condition which gives rise to the dispute), the beneficial use made by that landowner must have ceased, and his right must, therefore, be considered to have been extinguished.

This court has recently held that the United States is not the owner of the water rights under the Reclamation Act, and is merely a carrier of water with no right to make any beneficial use thereof (*Ickes* v. *Fox*, 300 U. S. 82, at pages 94 to 96, 81 Law Ed. 525, at pages 530 to 531).

The general rule in irrigation states is that drainage waters, including return flow waters, belong to the stream from which they were taken for distribution among appropriators in the order of their priority, and are not the property of the landowner for whose land they were first diverted.

Comstock v. *Ramsey*, 55 Colo. 244, 133 Pac. 1107.

Durkee Ditch Company v. *Means*, 63 Colo. 6, 164 Pac. 503.

Trowell Land & Irr. Dist. Co. v. *Bijou Irr. Dist.*, 65 Colo. 203, 176 Pac. 292.

Rio Grande Reservoir and Ditch Co. v. *Wagon Wheel Gap Improvement Co.*, 68 Colo. 437, 191 Pac. 129.

Ft. Morgan Reservoir & Irr. Co. v. *McCune*, 71 Colo. 256, 206 Pac. 393.

Rock Creek Ditch & Flume Co. v. *Miller*, 93 Mont. 248, 17 Pac. (2d) 1074, 89 A. L. R. 200.

Rasmussen v. *Moroni Irr. Co.*, 56 Utah 140, 189 Pac. 572.

Schulz v. *Sweeney*, 19 Nev. 359, 11 Pac. 253.

Irrigation Co. v. *Campbell*, 2 Idaho 411, 18 Pac. 52.

Josslyn v. *Daly*, 15 Idaho 137, 96 Pac. 578.

McClintock v. *Hudson*, 141 Cal. 275, 74 Pac. 850.

Los Angeles v. *Hunter*, 156 Cal. 603, 105 Pac. 753.

Irrigation Co. v. *Irrigation Co.*, 31 Colo. 62, 72 Pac. 49.

Eddy v. *Simpson*, 3 Cal. 249, 58 Am. Dec. 408.

Marks v. *Hilger*, (C. C. A. 9) 262 Fed. 302.

Wills v. *Morris*, 100 Mont. 514, 50 Pac. (2d) 862.

II.

The Decision of the Circuit Court of Appeals in This Case is in Conflict With the Previous Decision of This Court in Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525.

The claims of the United States in this cause are all based upon the United States Reclamation Act cited supra. The original application made to the Nebraska State Department of Irrigation was made by the United

States in the year 1904 for the purpose of irrigating and reclaiming lands in Wyoming and Nebraska, including the lands now embraced within the Pathfinder Irrigation District, and from which the drains in question carry off the unused seepage and return flow. The United States has by contract turned over the canal through which water is carried to the Pathfinder Irrigation District lands to said district for operation, reserving control only of the channel reservoirs, power plants and diversion works on the river (Record, pp. 235 to 236). The contract under which this was done is set out fully in Exhibit G, attached to the plaintiff's bill of particulars (Record, pp. 69 to 104).

Moreover, entire control of the drains, in so far as they deliver water into the Tri-State Canal, rests with the officers of the Farmers Irrigation District, subject to the control and authority of these petitioners, the Nebraska State Irrigation Authorities (Record, pp. 236 to 237).

The decision of the Circuit Court of Appeals seems to be based upon *Ide* v. *the United States* (263 U. S. 497, 66 L. Ed. 407) rather than the later case of *Ickes* v. *Fox*. In the Ide case the controversy seemed rather to be as between the reclamation project and a *subsequent* appropriator who made a filing in which he attempted to appropriate the water after drainage from the reclamation project had transformed a dry-wash into a living stream. There is thus clearly a greatly different factual situation in the Ide case from that which exists in the instant case. In the instant case, these petitioners are attempting to distribute the unused drainage waters which come from a diversion of North Platte River waters, among appropriators from the North Platte River in the order of their priority and in conformity with the laws of the State of Nebraska and the laws of the

United States. With this method of distribution, the decision of the Circuit Court of Appeals interferes in that it requires that such waters should be supplied to junior appropriators within the Northport Irrigation District rather than to those water users having senior appropriations from the same source.

In applying the Ide case the court below apparently adopted the theory that the rights of the United States were essentially those of an appropriator from the stream who had the right to reuse the water. The discussion of this point is found on page 861 of 124 Fed. (2d) (Record, p. 746). The court's discussion of the rights of the owner of the irrigation canal is in part erroneous and in part not applicable to such a situation as that disclosed in the instant case.

The court says, "The owner of the irrigation project or canal also has an interest in such appropriative rights, by virtue of the fact that the statute permits him to make the appropriation and diversion, that the maintenance of such appropriative rights is necessary in accomplishing the purpose of the project or canal, and that the law imposes certain duties and obligations upon him in the carriage, distribution and conservation of the diverted waters."

In the first place the appropriation is not made by the United States. An appropriation includes more than filing an application for a permit and constructing the canal. An appropriation is not perfected or completed until the water is put to beneficial use. This is the effect of the opinion of Mr. Justice Brandeis in *Arizona* v. *California*, 283 U. S. 423 at page 459, 75 L. Ed. 1154 at 1168. The court there stated:

> "To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations."

The same rule is apparent from *Ickes* v. *Fox,* 300 U. S, 82, 81 L. Ed. 525, but it is perhaps more clearly stated in the opinion in that case in the court below, 85 Fed. (2d) 294 at page 298, in the following language:

> "It is settled irrigation law that mere diversion and storage of water does not constitute an appropriation. Before there can be an appropriation the water must be applied to a beneficial use. Highland Ditch Company v. Union Reservoir Company, 53 Colo. 483, 127 Pac. 1025. In Pioneer Irrigation D. Co. v. Board of Commissioners, (D. C.) 236 F. 790, the court, considering constitutional and statutory provisions similar to those of the state of Washington, held that under the Constitution and statute relating to water rights, as construed by the Supreme Court of the State, no property right can be acquired in the use of water until it is applied to a beneficial use. The owner of the carrying ditch gets no title or right to the use of the water and has no property in it subject to disposal, but such property right of disposal is in him who applies the water to beneficial use."

Nebraska law is to the same effect (*Commonwealth Power Company* v. *State Board of Irrigation,* 94 Neb. 613 at 616, 143 N. W. 937 at 938; *Kersenbrock* v. *Boyes,* 95 Neb. 407, 145 N. W. 837.

The Reclamation Act does not authorize the Secretary of the Interior or any other federal officer or agent to put water to beneficial use under an irrigation project. That is for the homesteader or landowner. Thus the Circuit Court of Appeals is in error in stating that the statute permits the United States, as owner of the irrigation canal, to make the appropriation. The actual situation is that the United States applies for the permit; the permit is issued to the United States; the United States then constructs the diversion works and canal and other necessary physical structures; the United States diverts the water. All these steps are necessary but not sufficient for a completed appropriation. That comes about only when the landowner has actually received the water and applied it to beneficial use. The canal owner is only a carrier of water having no beneficial interest in either the water or the water rights (*Ickes* v. *Fox*, 300 U. S. 82 at 95 to 96, 81 Law Ed. 525 at pages 530 to 531).

The court below further states that the interest of the United States comes about in part because the maintenance of the appropriative rights is necessary in accomplishing the purpose of the project or canal. This is obviously fallacious since the maintenance of the appropriative rights depends primarily upon the beneficial use made of the water. When the beneficial use ceases, the right ceases. This is elementary under irrigation law (Sec. 8 of the United States Reclamation Act, U. S. C. A., Title 43, Sec. 372).

67 C. J. 1022 (Waters, Sec. 450).
Dern v. *Tanner*, 60 Fed. (2d) 626.

The court below further states that the law imposes certain duties and obligations on the United States in

the carriage, distribution and conservation of the diverted waters. These duties are not defined, nor is the law cited as to where it is announced that such duties and obligations exist. However, even though that may be the case in some instances, in this situation those duties devolve upon the Pathfinder Irrigation District rather than on the United States. The trial court found upon uncontroverted evidence, that after the contract of 1926, "control of all of said Interstate Canal, including all structures, distribution system, etc., passed to said Pathfinder Irrigation District. That said irrigation district consists substantially of the lands in Nebraska irrigated and watered by said Interstate Canal, and its control, in accordance with the laws of the State of Nebraska, is in the hands of the landowners and water users" (Record, pp. 235 to 236).

Thus, the duties and obligations relating to the carriage, distribution and conservation of the diverted waters are entirely in the hands of the Pathfinder Irrigation District, a Nebraska corporation, controlled by the landowners and water users.

This condition even more clearly prevails in relation to the lands of the Northport Irrigation District, which carries and distributes the waters for the Northport lands for which the United States wishes to make these waters available (Record, p. 236). In the case of the Northport Irrigation District, even the diversion works are not in the control of the United States. The waters diverted from the river for the benefit of the Northport are diverted by the Farmers Irrigation District at the head of the Tri-State Canal (Record, p. 238). The drainage waters that might physically be made available for the Northport lands are likewise entirely under the control of

the Farmers Irrigation District (so far as concerns their diversion) (Record, pp. 236 to 237).

Thus, it becomes clear that the court below is wrong in holding, as it does on page 861 of 124 Fed. (2d) (Record, p. 746), that the United States has a proprietary interest in either the appropriation for Pathfinder Irrigation District lands or in the appropriation for Northport Irrigation District lands.

III.

The Decision is in Conflict With an Earlier Decision of the Circuit Court of Appeals for the Ninth Circuit in Marks v. Hilger, 262 Fed. 302.

It is to be noted from the opinion of the Circuit Court of Appeals that the two cases on which the decision is based, namely, *Ide* v. *United States,* 263 U. S. 497, and *United States* v. *Ramshorn Irrigation District,* 269 Fed. 81, relate to conflicts between the reclamation project and *subsequent* appropriators. The instant case deals with the question as to whether the seepage waters, after they have left the lands for which they were appropriated and diverted, will be supplied to the senior appropriators in Nebraska or a junior reclamation project which is, likewise, in Nebraska. The analogy, therefore, is not with the Ide case or the Ramshorn case, but rather with the case of *Marks* v. *Hilger.* In that case the controversy was between an upper junior appropriator (Mr. Marks) and the lower senior appropriator (Mr. Hilger). Marks contended that he should receive the benefits of the return flow created by his large diversions in time of abundance, by being permitted to take an increased amount of water later in the season when the seepage from his lands enlarged the flow of the stream beyond its natural condition. The court said:

"It is established in Montana that the prior appropriator of water is entitled to the use of all the water in the stream to satisfy his appropriation, whether such water come from seepage or from the water naturally flowing the stream. In Beaverhead Canal Co. v. Dillon Electric Co., 34 Mont. 141, 85 Pac. 882, the court said:

> " 'The prior appropriator of a particular quantity of water from a stream is entitled to the use of that water, or so much thereof as naturally flows in the stream, unimpaired and unaffected by any subsequent changes which, in the course of nature, may have been wrought. To the extent of his appropriation his supply will be measured by the waters naturally flowing in the stream and its tributaries above the head of his ditch, whether those waters be furnished by the usual rains or snows, by extraordinary rain or snowfall, or by springs or seepage which directly contribute.'

"Again, under the doctrine that the prior appropriator is entitled to the quantity of water appropriated from the stream, the prior appropriator is entitled to satisfy that right, and it is immaterial whether such satisfaction is to be had out of the waters that naturally flow in the stream and its tributaries above the head of its ditch, or come from waters which run into the stream by rains, snows, springs or seepage."

It is the contention of petitioners that the Marks case definitely establishes the principle in the Ninth Circuit that return flow waters belong to the stream; are public waters; and that they must be distributed to the senior appropriators in accordance with the laws of the state where they become available. The decision of the Circuit Court of Appeals in this cause is directly contrary and, in effect, awards these return flow or seepage waters to

the junior at the expense of the senior, solely upon the theory that they are not available to the public for distribution to appropriators in the order of their priority.

IV.

The Interpretation of the Reclamation Act and the Authority of State Officials Over Waters Appropriated Pursuant to the Reclamation Act Has Not Been But Should Be Decided By This Court.

It is apparent from the record in this cause that the contention is being made upon behalf of the United States that the officials of the United States are authorized to proceed independently of the authority of the State Irrigation Officials of the State of Nebraska, notwithstanding the provisions of Section 8 of the Reclamation Act above stated. It will be recalled that the terms of Section 8 (in so far as applicable to this point) provide as follows:

> "Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof. (June 17, 1902, c. 1093, Sec. 8, 32 Stat. 390.)" (U. S. C. A. Title 43, Sec. 383.)

It is true that in the case of *Nebraska* v. *Wyoming*, 295 U. S. 40, this court held that this provision of the

act of congress made the Secretary of the Interior subordinate to the state authorities in connection with the operation of the reclamation project. It is likewise true that in the case of *California-Oregon Power Company* v. *Beaver Portland Cement Company*, 295 U. S. 142, this court likewise recognized the authority of state laws and state administrative authorities over the waters of the state even in the western states which were carved out of the public domain.

In neither of these cases, however, was the United States or any officer of the United States a party at the time of the decision, nor does it appear from the published reports that the United States Department of Justice participated in briefs or arguments either as friend of the court or otherwise.

The action of the United States Bureau of Reclamation in connection with this cause and the contentions made by the United States, together with the decision by the Circuit Court of Appeals, would seem to indicate a theory that the United States is seeking to control the waters independent of the administrative authority of the Nebraska State Irrigation Authorities. These authorities, as petitioners herein, respectfully submit that such an interpretation is contrary to the specific language and the specific direction of the Reclamation Act as above quoted, and is contrary to the previous opinions of this court.

Clearly the question of the relative positions of the State Irrigation Authorities and of the Department of the Interior and Bureau of Reclamation is an important issue in this case, and can properly be decided herein, since the parties are before this court. It is obvious that the public interest requires the authoritative decision by this court of so important a matter as between state and federal authorities.

V.

The Denial of Rights To the State of Nebraska in Relation To Water Rights on an Interstate Stream.

One of the defenses urged by these petitioners in the United States District Court was that the United States was guilty of inequitable conduct in relation to the subject matter of the litigation; that it sought equity without doing equity; and that it did not come into the court with clean hands. The inequitable conduct urged was that the United States had violated the principles of priority of appropriation by diverting and storing in Wyoming waters of the North Platte River under its junior priority of September, 1904, at times when those waters were needed by senior appropriators in Nebraska. This contention was sustained by the United States District Court, and a specific finding of fact was made in relation thereto (Record, p. 246).

The Circuit Court of Appeals held in relation thereto that the pendency of the Nebraska-Wyoming suit made it impossible for it to consider such equitable defense (Record, pp. 749 to 750, 769 to 770; 124 Fed. [2d], pp. 862 to 864).

Incidentally, in connection with this issue, the Circuit Court of Appeals states in its opinion on the petition for rehearing (Record, pp. 769 to 770; 124 Fed. [2d], pp. 863 to 864), that the trial court limited the questions to be considered so as to exclude all matters which were at issue in the case of *Nebraska* v. *Wyoming*, and that counsel acquiesced therein. We most respectfully submit that the record does not bear out this interpretation made by the Circuit Court of Appeals; in fact, quite the contrary is true as is demonstrated by the finding of fact

above mentioned. This issue, at least, was not eliminated by the trial court, either with or without acquiescence of counsel. On the contrary, the issue of the out-of-priority diversions was clearly considered by the trial court to be an important issue in the case.

We believe that the Circuit Court of Appeals did not sufficiently apprehend the nature of the issues involved in the case of *Nebraska* v. *Wyoming* nor its present status. The case of *Nebraska* v. *Wyoming* was filed as an original action in this court complaining of the actions of Wyoming in relation to the water of this interstate stream, and asking that Wyoming be required to let Nebraska have its proper share of such waters. The relief of individual appropriators is at issue in that case in so far as the actions of Wyoming appropriators, authorized and sanctioned by the Wyoming Irrigation Authorities, brings about the encroachment on Nebraska's share of the water, and so far as concerns Nebraska appropriators, their rights are important as being at least partially the measure of the rights of Nebraska.

In this case, however, the rights of the appropriators are directly involved, and their claims to the water are the precise subject of the adjudication sought.

We believe that the record shows that the United States has deliberately and consistently taken away from Nebraska senior appropriators large volumes of water out of priority. In fact this was going on in May of 1936 at the time when the plaintiff complains of the failure of Nebraska Irrigation Authorities to give to them the return flow waters (Record, p. 246). It was held by this court in *Weiland* v. *Pioneer Irrigation Company*, 259 U. S. 498, that where the respective states both recognize the principle of priority of appropriation rights,

then the rights as between appropriators from the same interstate stream but in different states, are to be determined upon the same principle of priority of appropriation.

It is well settled that where the United States comes into a court of equity as plaintiff, it is bound by the same principles of equity as if it were a private litigant.

Brent v. *The Bank of Washington*, 10 Peters 35 U. S. 596 at p. 615, 9 L. Ed. 547 at 555.

Luckenbach Steamship Co. v. *Norwegian Barque Thekla*, 266 U. S. 328 at 339, 69 L. Ed. 313 at 315 (Opinion by Mr. Justice Holmes).

Hemmer v. *United States*, (C. C. A. 8 Circ.) 204 Fed. 898 at 901.

Folk v. *United States*, (C. C. A. 8 Circ.) 233 Fed. 177 at 191.

Ladd and Tilton Bank v. *U. S.*, (C. C. A. 9 Circ.) 30 Fed. (2d) 334.

Shooters Island Shipyard Co. v. *Standard Ship Building Corporation*, (C. C. A. 3 Circ.) 293 Fed. 706.

Kandle v. *U. S.*, (C. C. A. 3 Circ.) 4 Fed. (2d) 183.

U. S. v. *Shelby Iron Company*, (C. C. A. 5 Circ.) 4 Fed. (2d) 829.

U. S. v. *Stinson*, (C. C. A. 7 Circ.) 125 Fed. 907 at 910.

U. S. v. *Chandler-Dunbar Water Power Company*, (C. C. A. 6 Circ.) 152 Fed. 25 at 40-41. 65 C. J. 1403.

Walker v. *United States*, 139 Fed. 409.

United States v. *Debel*, (C. C. A. 8 Circ.) 227 Fed. 775.

United States v. *Denver and Rio Grande Western Railroad Company*, (C. C. A. 8 Circ.) 16 Fed. (2d) 376.

Dayton Airplane Co. v. *United States*, (C. C. A. 6 Circ.) 21 Fed. (2d) 673.

Moreover, this court in *Nebraska* v. *Wyoming*, 295 U. S. 40, cited above, clearly recognizes the position of the United States in relation to a reclamation appropriation to be no better than that of the appropriators discussed in *Weiland* v. *Pioneer Irrigation Company*, supra.

The remedy suggested by the Circuit Court of Appeals was that the District Court might adjust the rights by making relief to the United States conditional upon its observance of priorities if this court should have decided that such observance should be had. This court will, of course, take judicial notice of its own records to the extent, at least, of examining the present status of the case of *Nebraska* v. *Wyoming*. The records of this court will disclose that the case of *Nebraska* v. *Wyoming* is now before the Special Master appointed by this court, and that no report has been made. As a matter of fact, it is not expected that his report can be ready before January, 1943, and, of course, following that it will be necessary for parties who feel themselves aggrieved to file exceptions with this court and brief them so that said case cannot probably be submitted to this court until the October term, 1943, at the earliest. Thus the remedy suggested by the Circuit Court of Appeals must be illusory.

It is thus respectfully submitted that the refusal by the Circuit Court of Appeals to consider the inequitable conduct of the United States as found by the District Court results in a substantial denial of justice to these petitioners.

VI.

The Circuit Court of Appeals Failed To Take Into Account the Benefits Already Received By the United States From the Return Flow or Seepage Waters.

It is the contention of these petitioners that the opinion and order of the Circuit Court of Appeals gives the United States double benefits at the expense of Nebraska appropriators. The record is clear that, due to the relation of priorities and the physical situation on the river, the operation of the return flow by furnishing it to senior Nebraska appropriators gives to the United States an equivalent benefit in that it is enabled to store water in the reservoirs and to divert waters at Whalen at times when the seniors are supplied from the return flow and at times when priority administration would otherwise require that the United States should be prevented from taking the water if the seniors did not get the return flow supply. This is the finding of the court below (Record, pp. 242 to 244). This is based upon uncontradicted testimony of the witness for the United States, Mr. Raymond F. Walter, the chief engineer for the Bureau of Reclamation (Record, pp. 383 to 384).

It is to be noted that in none of the cases involving matters of return flow has there been a similar situation unless, possibly, in the case of *Marks* v. *Hilger*, (C. C. A. 9) 262 Fed. 302. In that case, the physical situation is not as clearly stated as one could wish from this point of view.

We wish most respectfully to urge on behalf of the State Irrigation Authorities of Nebraska that equitable considerations make it unfair and unjust that the junior

appropriator should deprive the senior appropriator of these waters when they have already taken the benefit of them through the upstream uses.

CONCLUSION.

It is respectfully submitted that this is a cause of which this court should take jurisdiction. The Circuit Court of Appeals has failed to follow the applicable Nebraska law as well as the previous decisions of this court, and has brought about a conflict with the decisions of the Circuit Court of Appeals for the Ninth Circuit.

The result of the decision is to deprive senior Nebraska appropriators of waters to which they are entitled under Nebraska law, and we believe that upon the merits, if and when this court should grant certiorari, this court would conclude that the District Court was right and that its decree should be reinstated.

Respectfully submitted,

WALTER R. JOHNSON,
Attorney General of Nebraska,

JOHN L. RIDDELL,
Assistant Attorney General of Nebraska,

PAUL F. GOOD,
Special Counsel,
Solicitors for the Petitioners.